

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Docket No.

75-1033

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

CLYDE O. LEACH

Appellant

Appeal from the United States District
Court for the District of Vermont

BRIEF FOR THE UNITED STATES

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To be argued by
David A. Reed

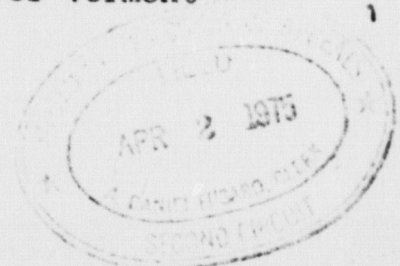


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PRELIMINARY STATEMENT

Clyde O. Leach appeals from a judgment of conviction entered on November 19, 1974 in the United States District Court for the District of Vermont after a three-day trial on July 23, 24, and 25, 1974 before the Honorable James S. Holden, Chief United States District Judge, and a jury. An indictment bearing criminal number 74-24, filed on February 28, 1974 charged Leach in one count as follows: That on or about February 2 and 3, 1974, Clyde O. Leach, the

defendant, knowingly and willfully did transport in interstate commerce from Rutland, in the District of Vermont, to Manchester, in the District of New Hampshire, a motor vehicle, to wit, a 1970 Volkswagen convertible VIN 1502305702 knowing the same to have been stolen, in violation of Title 18, United States Code, 2312.

Trial commenced on July 23, 1974, and on July 25, 1974, the jury returned a verdict of guilty. On November 19, 1974, Leach was sentenced to the custody of the Attorney General for a period of four years, the sentence to be served upon his release from state confinement on which he was presently being held.

STATEMENT OF FACTS

Government's Case

On February 2, 1974, James P. Sennett, salesman at Lindholm Motors Volkswagen in Rutland, Vermont, took three individuals for a test ride in a 1970 Volkswagen which had a beige body and a black convertible top and which bore VIN 1502305702.(Tr. 119). One of these individuals, the person who had requested the test ride, identified himself as Clyde Leach. Mr. Sennett, in open court, identified the individual to whom he gave the test ride as the defendant Leach. (Tr. 111). * After this test drive Leach and a woman whom he identified as his wife were left alone in the car from 10 to 15 minutes while they supposedly discussed the purchase of the car. (Tr. 112).

When Mr. Sennett returned to work on Monday morning, the Volkswagen he had given the test ride in was missing.

* GA, refers to Government Appendix; other references are DA, Defendant's Appendix; and Tr, Transcript; and D.Br., Defendant's Brief.

Later in the business week of February 4, Mr. Sennett went to Valley Motors in Manchester, New Hampshire to pick up the stolen Volkswagen which Valley Motors had received and reported to Lindholm Motors. (Tr. 117).

In addition to the woman Leach identified as his "wife", (actually a female friend of Leach's named Florence Carter), Leach was accompanied by an individual named Edgar Bousley on the Saturday afternoon of February 2, 1974, when he test drove the Volkswagen. Bousley corroborated the facts concerning the test drive of the vehicle by Leach, and Leach's time alone in the vehicle. Later that day, Leach returned to Bousley's home and showed Bousley a key which Leach had in his possession. Leach stated to Bousley that he had the key to the Volkswagen. He told Bousley that he was going to take the Volkswagen and asked Bousley if he wanted to accompany him. Bousley refused. (Tr. 136-37). Leach left saying that he would call Bousley later. Later that evening Leach did return and asked Bousley again if he was going to go with him to take the car. Bousley again refused. (Tr. 138-39).

Late Saturday, February 2 or early Sunday, February 3, 1974, Leach approached an individual named Douglas Brian Shand. Shand testified that Leach wanted Vermont license plates from him. (Tr. 158). Shand gave Leach Vermont plates. He never saw Leach or the license plates again until trial.

The Volkswagen was next located at Valley Motors in Manchester, New Hampshire, on Monday, February 4, 1974. (Tr. 177). The manager of Valley Motors, Frank Baker, testified concerning the circumstances under which he obtained this vehicle. An individual who identified himself as Clyde Leach, and who presented a Vermont registration and license in that name, inquired whether Mr. Baker wanted to buy a 1970 Volkswagen convertible, beige with black top. (Tr. 178). A Bill of Sale was signed in the name of Clyde O. Leach and was taken to a Justice of the Peace where it was notarized.

Baker identified Leach in the courtroom as being the man who sold him the Volkswagen on February 4, 1974. The Bill of Sale which was presented to Baker and signed by Clyde O. Leach identified the automobile as a 1970 Volkswagen with VIN 1502305702. The automobile, when

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sold to Baker by Leach, had an ignition key with it. Upon realizing that the car may have been stolen, Baker notified the police, to whom he surrendered the purported Bill of Sale. (Tr. 220). Subsequently, the car was returned to Mr. Sennett of Lindholm Motors by Baker and identified as being identical with the one stolen in Rutland, Vermont on February 2, 1974.

Clyde Leach was arrested in Rutland, Vermont on February 24, 1974. The next day, Special Agent James C. Mee of the Federal Bureau of Investigation interviewed Leach at the Rutland Correctional Center. Agent Mee identified himself and indicated the nature of his inquiry concerning a stolen Volkswagen. He then immediately read Leach his rights and Leach signed a Waiver of Rights form. (Tr. 230). Leach proceeded to give a full confession consistent with the foregoing testimony.

Leach told Agent Mee that on February 2, 1974, he was in the company of Edgar Bousley in Rutland and together, accompanied by a woman, they tried out a 1970 Volkswagen convertible at Lindholm Motors. When Leach and the woman were alone in the vehicle, Leach took one of the ignition keys from the key ring. He returned with the key that evening and stole the car. Leach subsequently went to Douglas

Shand and obtained Vermont license plates. He drove the vehicle to Brattleboro, Vermont, and then on to Manchester, New Hampshire. Leach said he sold the car in Manchester, New Hampshire. Leach told Agent Mee that while what he said was the truth he did not want to put it in writing. (Tr. 249). Subsequent to this interview, Agent Mee returned to Rutland Correctional Center and pursuant to court order obtained handwriting exemplars from the defendant Leach.

The final Government witness was Thomas A. Delaney, a handwriting expert with the Federal Bureau of Investigation. Agent Delaney had been provided with the purported Bill of Sale which Baker received from Clyde Leach on February 4, 1974; Waiver of Rights forms executed by Leach in the presence of Agent Mee; and handwriting exemplars of Leach obtained by Agent Mee. While Agent Delaney indicated that only a relatively small percentage of exhibits submitted for comparison result in a positive identification, he did positively conclude that all specimens submitted to him were written by the same author: Clyde O. Leach.

Defendant's Case

Defendant endeavored to create an alibi defense showing that he was in the State of Illinois on February 4, 1974. In an effort to support this defense, four witnesses testified: a friend of his named Dale Robert Bitner (Tr. 302); the defendant himself; Leach's estranged wife, Donna Leach (Tr. 372); and Leach's mother, Pearl Coli (Tr. 384).

Bitner testified that at approximately 6 P.M. on the evening of February 2, he took Leach to his mother's house in Manchester, Vermont. (Tr. 293).

The defendant Leach testified, in substance, that he was with his estranged wife, Donna B. Leach, in Danville, Illinois, on February 4, 1974. (Tr. 303). Concerning the events of February 2, 1974, Leach admitted that he had test driven the subject Volkswagen. Leach also admitted that he was in the Volkswagen by himself for a period of time and did see Douglas Shand over that weekend. (Tr. 308). Leach testified that Dale Bitner gave him a ride to his mother's house in Manchester, Vermont on Saturday evening, February 2, 1974. He further claimed that his mother, Pearl Coli, drove him to Albany, New York, where he boarded a bus for Danville, Illinois, late in the

evening of February 2 or early in the morning of February 3, 1974. (Tr. 310). Leach's purported purpose in going to Danville, Illinois, was to be present at a legal proceeding concerning his daughter on Thursday, February 7, 1974. (Tr. 320).

Leach denied ever seeing Frank Baker; denied any knowledge of a Bill of Sale related to the sale of the 1970 Volkswagen; denied obtaining license plates from Douglas Shand; and denied taking the key from the Volkswagen at Lindholm Motors. (Tr. 311-16).

In testimony Leach did recall his interview with Agent James Mee, at the Rutland Correctional Center, related to the stolen Volkswagen. He submits that Agent Mee did identify himself and state the nature of his inquiry. Leach testified that Mee's statement was inaccurate and that every admission subsequent to the fact that he had test driven a car was incorrect. On cross examination Leach admitted among other convictions, a prior similar conviction concerning interstate transportation of stolen vehicle from Vermont to the state of New York in 1965. Leach also admitted various convictions on false token and forgery.

Next to testify for the defendant was his estranged wife, Donna Belle Leach, who lives in Danville, Illinois. She testified that Clyde Leach arrived at her home in Danville, Illinois, on Monday morning, February 4, 1974. She corroborated Leach's statement that his purpose in being in Illinois was to participate in a legal matter concerning their daughter. Mrs. Leach further testified that her husband attended a legal appointment on Thursday, February 7, 1974, in Danville, Illinois.

Leach's mother, Pearl Coli, testified that she took Leach to Albany to board a bus for Danville, Illinois on Saturday evening, February 2, 1974. (Tr. 387).

In substance, this concluded the evidence.

ARGUMENT

POINT I.

THE INDICTMENT IN THE PRESENT CASE WAS NOT BASED ENTIRELY UPON HEARSAY. IN ANY EVENT, HEARSAY EVIDENCE CONSTITUTES A PROPER AND SUFFICIENT BASIS FOR AN INDICTMENT.

Recently the Supreme Court dealt with the issue of competent evidence before the Grand Jury in United States v. Calandra, 414 U.S. 338 (1974). In that case, the Supreme Court reaffirmed its holding in Costello v. United States, 350 U.S. 359 (1956), stating:

the grand jury sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, Costello v. United States, *supra*; Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910) or even on the basis of information obtained in violation of the defendants Fifth Amendment privilege against self-incrimination. Lawn v. United States, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed 2d 321 (1958). Calandra supra, p. 344-45.

The Second Circuit Court of Appeals, while remaining consistent with the rulings in Costello and Calandra, has delineated a specific problem area in United States v. Estepa, 471 F.2d 1132-35 (2d Cir. 1972):

Even though there is no affirmative duty to tell the Grand Jury in haec verba that it is listening to hearsay, United States v. Malofsky, 388 F.2d 288, 289 (2d Cir.), cert denied, 390 U.S. 1017, 88 S.Ct. 1273, 20 L.Ed. 2d 168 (1968), the Grand Jury must not be 'misled into thinking it is getting eye-witness testimony from the agent whereas it is actually being given an account whose hearsay nature is concealed'
United States v. Leibowitz, 420 F.2d 390, 42 (2d Cir. 1969).

The Estepa prohibition was not violated in the present case, as a fair reading of the Grand Jury minutes establishes. (DA 1-3).

The sources of information from which Agent James Mee testified were made clear and unambiguous to the Grand Jury. He indicated that he received information from Sennett, the salesman from Lindholm Motors, by telephone, that the car was missing. Agent Mee also stated that he had an interview with a person from Valley Motors in Manchester, New Hampshire. He further

testified to interviews with Edward Bousley and Douglas Shand. (DA 1-3) The Grand Jurors, by applying their common sense, could not possibly have believed that they were hearing the testimony of an eye-witness to each of these matters, because Agent Mee identified who the eye-witnesses were and what they said to him.

Most significant, of course, was Agent Mee's testimony concerning the admissions by the defendant to each element of the crime of interstate transportation of a stolen motor vehicle. The statement clearly was a confession, and therefore constituted an exception to the hearsay rule. Since a confession could be conclusive before a petit jury applying the high standard of beyond a reasonable doubt; certainly, such a confession is more than sufficient to form the basis of the Grand Jury's return of an indictment, applying the lesser standard of probable cause.

As to that portion of testimony which was hearsay, Costello and Calandra supra, permit its admissibility. The factual circumstances, here present, as evidenced by the Grand Jury minutes, are apposite, not with Estepa, but with United States v. Harrington 490 F.2d

487 (2d Cir. 1973), which holds:

A substantial amount of Agent Brandon's testimony was undoubtedly hearsay, yet the testimony was delivered in such a way that the Grand Jury could not have been deceived into believing that it was hearing a recitation of the agent's first-hand observations. The prosecutor's presentation here is thus totally distinguishable from that of Estepa. United States v. Harrington, p. 490.

In conclusion, in Costello and Calandra, the Supreme Court unequivocally held that hearsay testimony was evidence upon which a Grand Jury indictment may be founded. The one limited area of concern which the Second Circuit has focused upon, the Estepa problem, does not apply to this case on its facts. Therefore, the trial court was correct in denying defendant's motions for dismissal of the indictment based upon the alleged hearsay nature of the testimony before the Grand Jury.

POINT II.

THE COURT CORRECTLY DENIED DEFENDANT'S
MOTION FOR A MISTRIAL BASED ON THE
GOVERNMENT'S REFERENCE TO THE GRAND
JURY IN ITS OPENING STATEMENT.

During the Government's opening statement, the Assistant United States Attorney made reference to the fact that the case was initiated by an indictment returned by a Grand Jury. (D.Br. 18; GA 3). Leach argues that the reference was improper and prejudicial. In the context of this case, neither the law nor facts support this argument.

Leach cites no case even suggesting that such a reference to the Grand Jury is improper. The case which Leach does cite, United States v. Signer, 482 F.2d 394 (6th Cir. 1973) clearly is factually inapposite to the present case. Both the Signer case and the case of the Government of the Virgin Islands v. Turner, 409 F.2d 102 (1st Cir. 1969) (which Appellant does not cite), deal with allegations made during the opening statements of numerous crimes for which the defendant is not charged or of crimes which the prosecution is aware it cannot prove. The Signer and Turner cases are examples of aggravated and continued improper references which

maligned the defendant. Such a situation is not present in the instant case.

The reference to the Grand Jury in opening remarks of the Government's case was introductory in nature, intending to explain how the case had reached trial and what the charges were. Certainly, it is proper to outline the charges so the elements of the crime may be enumerated for purposes of explaining what the Government's prospective evidence was going to prove in establishing these elements.

Ever assuming, however, that this remark might have affected the jury, the trial court, which observed the totality of circumstances under which the comment concerning the Grand Jury was made, concluded that a mistrial was not justified. What affect, if any, the reference to the Grand Jury had upon the petit jury was neutralized during the course of the three day trial. Immediately after defendant's motion for a mistrial was denied, the Assistant U.S. Attorney representing the Government pointed out that what he had to say was not to be taken as evidence. Prior to the questioned reference

to the Grand Jury, the Court instructed that an indictment raised no inference of guilt and explained to the petit jury the role of an indictment in a criminal proceeding. These instructions concerning the indictment and the Grand Jury were repeated in the Court's charge to the jury prior to their deliberation. (GA 1-5).

The Government's evidence in this case was of considerable weight: a full confession was made by the defendant to an Agent of the F.B.I., and a positive handwriting analysis established Clyde Leach as the author of the purported Bill of Sale which was given to Frank Baker in Manchester, New Hampshire, on February 4, 1974, when Leach conveyed the stolen car. (Tr. 249, 270). On the basis of the Government's overwhelming case, the jury rejected outright Leach's alibi defense.

The neutralizing effect of the Judge's charge, if such neutralization was in fact necessary, regarding the remark concerning the Grand Jury and the overwhelming nature of the Government's case, lead to the conclusion that any reference to the Grand Jury in the Government's opening statement "not singled out and standing

alone, but in relation to all else that happened . .
had but very slight effect" on the jury's determination
of guilt. Kotteakos v. United States, 328 U.S. 750,
P. 764 (1946).

CONCLUSION

The conviction of Clyde O. Leach should
be affirmed.

Respectfully submitted,

GEORGE W. F. COOK
United States Attorney for the
District of Vermont, Attorney
for the United States of America

DAVID A. REED
Assistant United States Attorney,
Of Counsel

March 27, 1975

GOVERNMENT'S APPENDIX

1 case so that if you happen to be summoned to the jury box
2 during the course of the selection of the Jury in this case,
3 that you will understand what the case is about as well as
4 having knowledge of the matters that are important and any
5 inquiry that will be made by the Court and counsel, to accom-
6 plish that result.

7 This is a criminal case that is, comes
8 before you by reason of an indictment by a grand jury sitting
9 in the United States District Court, For The District of
10 Vermont. The indictment is an accusation made by the grand
11 jury and it charges the defendant, CLYDE O. LEACH, who is
12 sitting in the court room with his, at this table with his
13 counsel, it charges that Mr. LEACH on or about February second
14 1974, in the District of Vermont, that the defendant did know-
15 ingly and wilfully, transport in inter-state commerce from
16 Rutland in the District of Vermont to Manchester, in the
17 District of New Hampshire a motor vehicle, namely, a 1970
18 Volkswagen convertible, knowing the same to have been stolen,
19 in violation of the provisions of the Federal Statute relating
20 to such matters, namely, Title 18 of The United States Code,
21 Section 2312.

22 Now, the Defendant has pleaded "not
23 guilty" and by his plea of "not guilty" has raised issues of
24 fact which the Jury that is to be selected in this case, must
25 try.

26 An indictment returned by a grand jury,
27 is a formal document which the Government uses to commence its

1 charge against the defendant and it is the means by which the
2 Government brings its case into Court.

3 Now, the indictment serves no other
4 purpose whatsoever and it is the sole purpose of the indict-
5 ment is to serve as an accusation or charge which the United
6 States makes against the defendant and it also serves to in-
form the defendant of the crime with which he is charged.

7 Now, the indictment is not evidence
8 against the accused and affords no inference whatsoever of
9 guilty. The Government has the burden of proof to establish
10 the guilt of one it accuses, beyond a reasonable doubt.

11 With this in mind, we will proceed to
12 select the jury to hear this case and in this manner, the
13 Government and the defendant, by inquiries that are asked by
14 the Court and by counsel, the Government and the defendant
15 are able to determine whether or not a person should sit as a
16 member of the jury to try the issues of fact that will be
presented.

17 Mrs. Coursey, will you tell us where you
18 reside and how long you have lived there?

19 MRS. COURSEY: Pittsford. I've lived
20 there for ten years.

21 THE COURT: And where did you reside
before then?

22 MRS. COURSEY: Castleton.

23 THE COURT: Are you presently employed?

24 MRS. COURSEY: No.

1 THE COURT: The Court will sustain your ob-
2 jection.

3 MR. COHEN: May I further my objection?

4 THE COURT: Pardon?

5 MR. COHEN: May we approach the Bench?

6 THE COURT: Yes.

7 (AT THE BENCH OUT OF HEARING BY THE JURY)

8 MR. COHEN: On behalf of Mr. LEACH, I would
9 move for a mis-trial at this point.

10 THE COURT: Motion denied. Proceed.

11 MR. REED: As I started out to say, you are
12 here today to try this case and as Judge HOLDEN instructed you
13 this morning, this indictment charges that the Defendant, CLYDE
14 LEACH, did knowingly, wilfully in inter-state commerce from
15 Rutland, Vermont in the District of Vermont to the District of
16 Manchester, New Hampshire, in the District of New Hampshire,
17 transport a motor vehicle, a 1970 Volkswagen convertible, know-
18 ing the same to have been stolen in violation of Title 18, of
19 the United States Code, Section 2312.

20 As the Judge has indicated in his prelimin-
21 ary instructions, I now have an opportunity to give what is
22 called an opening statement, which is my opinion of what I
23 believe the Government's testimony will show. The testimony
24 and evidence coming from witnesses and not from myself.

25 I believe the Judge will instruct, later in
26 the course of the trial that this case has two elements, each
27 criminal case has elements that the Government has a burden of

1 concerning things which should or shouldn't concern you, I
2 believe also, that the Court will instruct you that the penal-
3 ties, if there is, well, you would assume there is one, but
4 the penalty of punishment shouldn't be your consideration.
5 You should abide by your common sense and your every day
6 knowledge, which is the corner stone of the Jury system, to
7 the testimony that you have received and decide which you do
8 believe. If you do so, then you will find the defendant
9 guilty, thank you. (3:29 p.m.)

10 THE CLERK: The Crier will make
11 proclamation for strict silence while the Court delivers the
12 charge to the Jury.

13 (Crier delivered proclamation for
14 strict silence in the court room)

15 THE COURT: Ladies and Gentlemen of
16 the Jury, the Court appoints Mr. LOOMIS as your Foreman.

17 This is a criminal prosecution by the
18 United States of America against the Defendant, CLYDE O. LEACH.
19 ment
20 It comes to the Court by way of a present/of the Grand Jury and
21 in an indictment which accuses the defendant of unlawfully
22 transporting a motor vehicle, known to have been stolen, from
23 Vermont to New Hampshire, in violation of the laws of the
24 United States.

25 The case comes on for trial on the
26 Defendant's plea of "not guilty" to these charges. Now, later
27 in the course of the instructions, I will refer to the specific
28 offense alleged in this trial, but before considering the

1 specific charge asserted in the indictment I will instruct you
2 concerning certain rules, certain general rules, that are to
3 govern your deliberations in this case.

4 It is your duty as jurors to follow
5 the law as stated in the instructions of the court and to apply
6 the rules of law so given to the facts, as you find them to
7 be from the evidence in the case and you are the sole judges
8 of the facts.

9 You are not to single out one instruc-
10 tion alone or one part of the instructions as stated in the
11 law but you must consider the Court's instructions as a whole.

12 Now, the fact that the defendant has
13 been indicted by the Grand Jury must in no way influence your
14 verdict. As I indicated earlier in preliminary instructions,
15 the indictment is nothing more than a formal method of accusing
16 the defendant of a crime preliminary to trial.

17 A Grand Jury investigation is necessar-
18 ily one-sided. The Government presents to it all evidence
19 favorable to the return of an indictment, whereas the defendant
20 has no opportunity to present evidence in his behalf.

21 Thus, the indictment is not evidence of
22 any kind against the accused and does not create any presump-
23 tion or permit any inference of guilt.

24 Now, credibility of witnesses is an
important factor in this small case. It is particularly im-
portant in this case now, how you determine the truth and how
do you apprise the credibility of the witnesses. Well, you

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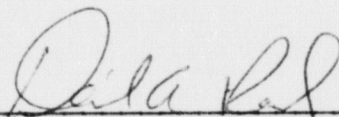
CLYDE O. LEACH,

Appellant

Docket No. 75-1033

CERTIFICATE OF SERVICE

I do hereby certify that on the 29th day of March, 1975, I made service of the BRIEF FOR THE UNITED STATES upon Clyde O. Leach, appellant, by mailing two copies of same, postage prepaid, to Norman Cohen, Esq., 26 West Street, Rutland, Vermont 05701, attorney for appellant.



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